93-615

Supreme Court, U.S.
FILED
OCT 18 1993
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

REYNALDO ALONSO ATKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 18, 1993

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QUESTIONS PRESENTED

1. Whether the sentencing judge's consideration of charges of which the Petitioner had been acquitted violated the Fifth Amendment's prohibition against double jeopardy and Petitioner's due process rights.

2. Whether Section 1B1.3(a); 1B1.3(A)(1)(2)(3) of the sentencing guidelines is unconstitutional to the extent it allows a sentencing judge to consider as relevant conduct that conduct Petitioner has been acquitted of by a jury.

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Fifth Amendment of the United States Constitution 7

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia is found in *United States v. Atkins*, CR-89-00037-01. It is an unpublished opinion attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on May 3, 1993. The Petitioner filed a Petition for Rehearing En Banc on June 17, 1993. The Petition was denied on July 16, 1993.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

PROVISIONS

I. The Double Jeopardy and Due Process Clauses of the Fifth Amendment of the Constitution.

II. The United States Sentencing Guidelines specifically, U.S.S.G. 1B1.3(a); 1B1.3(a)(1)(2)(3).

STATEMENT OF THE CASE

On February 8, 1989, the defendant, Reynaldo Atkins (Petitioner), and four co-defendants were charged in a four-count indictment, with Distribution of Cocaine pursuant to 21 U.S.C. §841(1) and (b)(1)(A)(i); Distribution of Cocaine with Intent to Import pursuant to 21 U.S.C. §960(a)(3), (b)(1); (b)(2)(A); Conspiracy and Attempt pursuant to 21 U.S.C. §959(a)(c); 21 U.S.C. §963; and Aiding and Abetting pursuant to 18 U.S.C. §2. On May 31, 1989, the Government filed a superseding indictment adding charges of Possession with Intent to Distribute Cocaine pursuant to 21 U.S.C. §841(b)(1)(A)(ii), and Importation of Cocaine pursuant to 21 U.S.C. §952(a).

The four co-defendants pled guilty to conspiracy in violation of 18 U.S.C. §371 before the Honorable Charles R. Richey on June 13, 1989. At the time of their

pleas they admitted, under oath, that they were involved in the drug activity alleged in the indictment with Petitioner. Petitioner was arrested after the co-defendants entered their pleas. His jury trial commenced on June 5, 1990 befor the Honorable Charles Richey. On June 8, 1990, the jury returned a verdict convicting Petitioner of Count Seven, which alleged unlawful possession with intent to distribute cocaine and aiding and abetting of one ounce of cocaine on September 22, 1988. The co-defendants did not testify at Petitioner's trial or sentencing. He was sentenced to two hundred thirty-five months on November 28, 1990. He noted an appeal from that conviction.

During the course of the trial, the Government offered the testimony of several DEA agents and two confidential informants, Mustafa Sanni and Roxanne Walker, to prove its case against Petitioner. They testified about setting up the deal to bring eighteen kilograms of cocaine back from Panama.

Roxanne Walker (Walker) testified she first met Petitioner at a meeting with Mustafa Sanni at Ecuban Realty on October 6, 1988. The offense for which Petitioner was convicted took place on September 22, 1988 at a time when there was no evidence that the alleged trip to Panama had been contemplated. Walker testified Petitioner told her he was looking for someone to bring some cocaine back to him from Panama. According to Walker, no arrangements were discussed at that meeting and the next time she saw Petitioner was at a meeting on November 16, 1988 that lasted twenty-five minutes in which cocaine was discussed. She tried to contact him after that October 6th meeting but was unsuccessful. Walker was scheduled to leave for Panama the next day to handle other drug business she had there. According to her,

Petitioner had thirty-eight kilograms in Panama of his own, but since he did not have anyone to bring it back to him, he was going to buy from her. Walker testified, she was going to charge Petitioner six thousand per kilo plus five thousand dollars per kilo for transportation. Petitioner was supposed to give her fifty-five thousand as down payment. The transportation costs of thirty-five thousand had to be paid up front. Petitioner was supposed to get the money and give it to her at the airport the next day. Walker testified that later that same evening Petitioner called her and wanted to know if he could see her. When she asked why? Walker testified he said something about the alleged deal, or the call was about something personal and she did not know what it was about. The next day, according to Walker, Petitioner went to the airport but did not give her any money. Walker went to Panama, picked up the cocaine, and brought it back to the United States. The cocaine was never delivered to Petitioner. Walker testified she called and spoke to a person she believed to be Petitioner but it was never stipulated that it was him. During deliberations, the jury sent the Court a note and asked, "Did Mr. Mance say that was his client on the telephone?" The jury was informed that here was no agreement that it was Petitioner on the telephone. Shortly thereafter, a guilty verdict was returned against Petitioner on the count previously mentioned.

Petitioner was sentenced by Judge Richey on November 28, 1990. The issue at sentencing was the application of 1B1.3(a) of the Sentencing Guidelines and whether it was appropriate, under the facts of this case, for the Court to consider offenses for which Petitioner had been acquitted as relevant conduct. It was also argued that the offense of conviction was not a part of the alleged conspiracy to import.

The count upon which Petitioner was convicted placed him at a base level of 16. His sentencing range was from twenty-seven (27) to thirty-three (33) months. The Court by using the counts for which Petitioner was acquitted increased his base level to 34, because the count on which he was acquitted, and used as relevant conduct, involved eighteen (18) kilograms of cocaine. The government argued that Petitioner was a leader and an organizer warranting an additional increase of four points. The probation officer agreed and the court added an additional four points pursuant to §3B1.1(a) of the Sentencing Guidelines. This resulted in Petitioner receiving a sentence of 235 months.

Petitioner appealed the inclusion of conduct of which he had been acquitted as violative of his due process rights and rights against double jeopardy.

REASONS FOR GRANTING THE WRIT

The Sentencing Guidelines allow the sentencing judge to consider evidence that does not constitute an element of the offense of conviction. Section §1B1.3(a) of the Sentencing Guidelines reads:

> "in a drug distribution case, quantities and type of drugs not specified in the count of conviction are to be included in determining the offense level if they were a part of the same course of conduct or part of a common scheme or plan as the offense of conviction.

Following Congressional enactment of the Sentencing Guidelines of 1984, it became clear the Sentencing Commission gave the sentencing judge the power to consider the "[a]mount of drugs calculated on the basis of conduct of which the defendant is neither charged nor

convicted but was 'part of the same course of conduct or common scheme or plan as the offense of conviction' . . . to adjust the offense level." *United States v. Restrepo*, 903 F.2d 648, 653 (9th Cir. 1990). This language was used in a number of circuits by sentencing judges, even in cases where such enhancement of sentence resulted from consideration of conduct attributed to the defendant which a jury had returned verdicts of not guilty. *United States v. Ryan*, 866 F.2d 604 (3rd Cir. 1989); *United States v. Mocciola*, 891 F.2d 13 (1st Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177 (2nd Cir. 1990); *United States v. Gurrero*, 863 F.2d 245 (2nd Cir. 1988); *United States v. Isom*, 886 F.2d 736 (4th Cir. 1989).

In the District of Columbia Court of Appeals' order dated May 3, 1993, denying Petitioner's appeal, the Court directed Petitioner to its decision in *United States v. Boney*, 977 F.2d 624, 636 (D.C. Cir. 1992) in which the Court stated that decision had decided Petitioner's issues.

Petitioner argues that when the sentencing judge considered conduct rejected by the jury, that in effect reversed the jury's verdict and was tantamount to forcing Petitioner to defend against the charges alleged in the indictment in two successive judicial proceedings, except the standard of proof in the second proceeding is lowered and is without a jury. *United States v. Burke*, 888 F.2d 862 (D.C. Cir. 1989). When a Defendant is punished for a criminal offense, the due process clause protects the Defendant from conviction except, upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. *In Re Winship*, 397 U.S. 390 (1970). Where, as here, a Defendant's sentence is based on the sentencing

judge's reevaluation of evidence, that a jury has rejected, it subjects a Defendant to another trial where the standard of proof is less than a reasonable doubt constituting a violation of the Fifth Amendments double jeopardy and due process clauses.

The Court of Appeals for the District of Columbia in *Boney*, stated:

> A not guilty verdict establishes only that the government has not proved each element of the offense beyond a reasonable doubt. It does not rule out the possibility that, more likely than not, the defendant engaged in the conduct.

This statement clearly demonstrates that in the District of Columbia Circuit, guilt is reconsidered, by the sentencing judge in spite of a jury's finding of not guilty.

The Court in *Boney*, admits that because of relevant conduct a defendant found not guilty on one count, and guilty on another, can receive the same sentence as if he was convicted of the count he was acquitted. *Id. at 636.* In a system of justice based as much on the appearance of justice as its dispensation, a defendant cannot reasonably say he was given substantial justice and fair play when a crime for which the jury has found him "not guilty" is being used to impose a period of incarceration on him as if he was convicted.

The Petitioner cannot say that there is a great numerical split in the circuits that would warrant Supreme Court intervention to resolve the split, but, the Ninth Circuit Court of Appeals in *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991), has held that a sentencing judge may consider evidence of a prior acquittal as long as it is not relied upon to enhance the sentence, as was done to

Petitioner. *Id.* In *Brady* the court specifically rejected this argument when it analyzed *United States v. Ryan*, 866 F.2d 604 (3rd Cir. 1989). In *Ryan*, the jury acquitted the defendant of possession of a controlled substance but found him guilty of simple possession of a controlled substance. The Defendant argued that the sentencing judge erred when it considered the packaging of the drugs as a means to depart from the sentencing guidelines. The Court of Appeals argued that prior to the sentencing guidelines a sentencing judge could consider evidence on counts of which a Defendant had been acquitted. It reasoned that the Sentencing Commission intended to permit sentencing judges to consider evidence where a Defendant had been acquitted. On this point the Court in *Brady*, stated:

> We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted.

The Ninth Circuit's holding in *Ryan* represents a split that demands clarification by the Supreme Court because it involves a principle of law that is at the heart of our judicial system, i.e., whether a defendant found not guilty of an offense may yet be punished as if he was convicted of that offense.

SUPREME COURT PRECEDENT

The Petitioner is not aware of any Supreme Court Precedent on the issue of whether the sentencing judges' use of the Sentencing Guidelines relevant conduct section, includes use of conduct for which a defendant was acquitted to enhance a Defendant's sentence. The Petitioner is aware of *Mistretta v. United States*, 488 U.S. 361 (1989) where the Supreme Court addressed the issue

of whether the United States Sentencing Commission was properly created and whether Congress's delegation of authority to the United States Sentencing Commission was proper. The Supreme Court did not address the issues raised by Petitioner in *Mistretta*.

Prior to the enactment of the Sentencing Guidelines in 1984, the sentencing philosophy as articulated by the Supreme Court in *Williams v. New York*, 337 U.S. 241 (1949) [was]:

> A sentencing judge . . . is not confined to the narrow issue of guilt. His task within the fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue has been determined. Highly relevant – if not essential – to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."

There is nothing in *Williams* that allows the sentencing judge to use evidence from an acquittal to enhance or sentence a defendant.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

October 18, 1993

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to Ramsey Johnson, Acting United States Attorney for the District of Coumbia, 555 4th Street, N.W., Washington, D.C. 20001, this 18th day of October, 1993.

_____

R. Kenneth Mundy

APPENDIX A

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term, 1992

CR-89-00037-01

[Filed May 03 1993]

No. 90-3283

United States of America

v.

Reynaldo Alonso Atkins, Appellant

Appeal from the United States District Court
for the District of Columbia

Before: Edwards, Ruth B. Ginsburg, and Silberman,
Circuit Judges.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of counsel. After full review of the parties' submissions, the court is satisfied that appropriate disposition of the case does not warrant an opinion. *See* D.C. Cir. Rule 14(c).

The district court did not err in considering for sentencing purposes the conspiracy charges of which defendant had been acquitted. *See United States v. Boney*, 977 F.2d 624, 636 (D.C. Cir. 1992) ("Sentencing Guidelines

allow the use in sentencing of conduct underlying acquitted counts."; "Conduct underlying the acquittal may be used in sentencing as long as it is proved by a [preponderance of the evidence]."). Furthermore, the district judge properly relied upon the evidence presented at trial and the facts reflected in the presentence report, *see United States v. Dale,* No. 91-3229, slip op. at 59 & n.54 (D.C. Cir. April 6, 1993), in determining that defendant played a leading role in a single "course of [drug trafficking] conduct," comprising one "common scheme or plan." *See* U.S.S.G. 1B1.3(a)(2). It is, therefore,

ORDERED AND ADJUDGED that the judgment from which this appeal has been taken be affirmed.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15(b)(2).

Per Curiam
For the Court:

/s/ Ron Garvin
RON GARVIN
CLERK